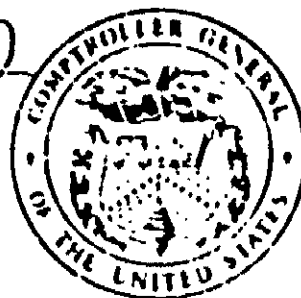


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DECISION



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**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-203913; B-204102 **DATE:** January 8, 1982

MATTER OF: Allied Sales & Engineering, Inc.

DIGEST:

1. Protester alleging bad faith in agency decision to cancel solicitation has not met its burden of meeting judicially established standard of "well-nigh irrefragable proof" where record shows that agency merely insisted on compliance with terms of solicitation's data requirements.
2. Protest that agency erred in concluding that offeror did not establish that engine part offered was equal to that specified in solicitation is denied. Although it appears that the agency may have procured similar item manufactured by protester ten years ago, record fails to establish that previously procured item was identical to that offered by the protester under subject solicitation and thus this information alone did not prove the long term durability of protester's part.

Allied Sales & Engineering, Inc. protests the cancellation of request for proposals (RFP) No. DLA 700-81-R-0153 by the Defense Construction Supply Center (DCSC). The RFP requested offers for 265 camshaft assemblies identified as Detroit Diesel Allison Division, General Motors Corporation, part number 5126934 or Korody-Colyer part number K5126934. Allied contends that it was entitled to the award because its item is completely interchangeable with the Detroit Diesel part and its price was lower than Detroit Diesel's. For the reasons stated below, we deny the protest.

The solicitation was issued on October 30, 1980. Offerors were required to certify that one of the manufacturers' products listed in the solicitation and bearing the part number specified would be furnished. In its offer, Allied certified that it would deliver Detroit Diesel's part to the Government. Subsequently, on November 26, the contracting officer contacted Allied to obtain evidence that the firm was an authorized Detroit Diesel dealer. He was then informed that Allied, despite its certification, intended to supply an item manufactured by Universal Camshaft Co. Allied stated that Universal was the major supplier for Detroit Diesel, the original manufacturer of the equipment. The contracting officer permitted Allied to amend its offer to properly reflect Allied's supplier of the item.

The solicitation also required that offerors furnishing other than the specified parts provide detailed data for the purpose of permitting qualification of their part by the Government's technical personnel. Accordingly, Allied was requested by the agency to submit drawings and performance test data in order to establish the technical acceptability of its item since the agency had no record of Universal's part having been accepted in the past. Allied subsequently submitted a drawing of Universal's camshaft but failed to provide any performance test data. The engineering support activity, after evaluation of the drawing, rejected the Universal part since it determined that the camshaft was a "critical component of the diesel engine used on M113A1 personnel carrier, on M106A1 mortar carrier, M730 guided missile carrier and others." The engineering activity further stated that only the original manufacturer's part was acceptable. Subsequently, the contracting officer was also advised by agency technical personnel that Korody-Colyer should not have been included in the solicitation as an approved source since its files contained no record of an evaluation of Korody-Colyer's camshaft. However, the matter was referred to the Army, the user agency, which is currently evaluating Korody-Colyer's part to determine its acceptability for future acquisitions. Based on the engineering activity's recommendations, the contracting officer canceled the solicitation and issued a delivery order to Detroit Diesel.

The protester alleges that the cancellation, lacking a reasonable basis, was motivated by bad faith on the part of procuring officials, and was otherwise carried out in violation of law. Allied states that Universal has been manufacturing the part for Korody-Colyer since February 1970 for delivery to the Government. Allied also stresses Universal's extensive experience manufacturing this item for both commercial and military markets over an 11-year period. Allied contends that, in view of this extensive experience, Universal is a capable manufacturer of the item and that therefore the Government has made an arbitrary decision by requiring that the long term suitability of the part be established. Further, Allied maintains that it complied with the Government's data requirements by furnishing the contracting officer with the Universal drawing and some "filling data" which together were sufficient to enable proper evaluation of Allied's offer.

The contracting officer denies having acted in bad faith, pointing to his decision to delay award for nearly six months in order to permit Allied to revise its offer and to submit the required documentation concerning the technical acceptability of its item. Specifically, the agency states that Allied, as a non-original equipment manufacturer, failed to furnish test and performance data for its item as required by the terms of the solicitation. Further, while it is possible that Korody-Colyer may have delivered to the Government a part manufactured by Universal, delivery would have occurred between 1968 and 1971. Because of the time lapse, the agency states that it was unable to verify this allegation. In any event, because Korody-Colyer maintains separate drawings for this item, and inspects the part according to its own specifications and standards, Korody-Colyer's part is not in the agency's view necessarily comparable to Universal's part. Consequently, the agency maintains it could not accept the Universal part without an independent and separate evaluation of the item. Since Allied failed to timely submit sufficient evidence to establish the long term suitability of the Universal part, the agency maintains that it acted properly in refusing to consider Universal's part as an acceptable equal to the Detroit Diesel part.

We do not believe the record supports Allied's position that the procuring agency personnel acted in bad faith in canceling the solicitation. We have held that to support a finding of bad faith the record must show, in the words of the Court of Claims, "well-nigh irrefragable [irrefutable] proof" that the agency had a malicious and specific intent to injure the party alleging bad faith, Kalvar Corporation, Inc., v. United States, 543 F.2d 1298, 1301 (Ct. Cl. 1976); Honeywell Information Systems, Inc.--Reconsideration, B-193177.2, January 19, 1981, 81-1 CPD 26. The contracting officer provided Allied with more than adequate time to supply the information required by the solicitation to determine that its product was equal to the product named in the schedule. Allied failed to do so. The contracting officer nevertheless referred the available data to the engineering activity which rejected Universal's part as unacceptable. We fail to see how insistence by the agency on compliance with the terms of the solicitation can constitute bad faith.

With respect to the agency's refusal to consider Allied's product as an acceptable equal based on the information provided, we have held that the procuring agency is responsible for evaluating data supplied and ascertaining if it provides sufficient information to determine the acceptability of the item offered, Harris Corporation, PRD Electronics, B-202450, June 15, 1981, 81-1 CPD 486, and that we will not disturb this technical determination unless the protester shows it is unreasonable. Schottel of America, Inc., B-190322, February 15, 1978, 78-1 CPD 130. The solicitation required that when products were proposed as "equal" to the specified part, the offeror must furnish data relating to the specified part* to enable the Government to determine that the proposed part is in fact equal in all respects. See Defense Acquisition Regulation § 1-313(b). It is undisputed that Allied offered no data relating to the specified Detroit Diesel part. It

* The solicitation notes that this data is necessary because the Government does not possess sufficient data relating to the specified part to enable it to evaluate other suppliers' parts.

appears that the agency also would have been willing to accept the Universal part had Allied been able to produce test data relating to the long term durability of its part. It was unable to supply such test data. Instead, it has attempted to demonstrate the durability of the Universal camshaft by showing that the part had in fact been in use in military engines for a number of years. Although it appears that Universal may have manufactured some camshafts for the Government under several contracts with Korody-Colyer around 1970, it is unclear whether these parts were the exact item offered by Allied under the subject solicitation. Since Universal has not supplied these items for almost ten years and due to the claim of Korody-Colyer that these parts were made to its drawings rather than Universal's specifications, the agency maintains that this procurement history alone does not prove to its satisfaction that the Universal camshaft offered under the subject solicitation is "equal" to the Detroit Diesel part. In our view, Allied has not provided sufficient evidence to show that the agency's conclusions that the data submitted was insufficient and, based on available information, that Allied's item was unacceptable, were unreasonable.

Allied has also filed a protest on identical grounds concerning solicitation No. DLA700-81-Q-GS08 which lists the Detroit Diesel item as the only acceptable part. For the reasons stated above, we find no merit in this protest.

Allied also requests reimbursement for the costs of preparing its proposal. However, such costs can only be recovered if the Government has acted arbitrarily or capriciously with respect to the proposal. See Spacesaver Systems, Inc., B-197174, August 25, 1980, 80-2 CPD 146. In view of our conclusions, the protests and the claim are denied.

Harry D. Van Cleave
For Comptroller General
of the United States